



**State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES**

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Mill Lane Realty Trust
Attn: Jonathan Arndt, Trustee
25 Maplewood Avenue
Portsmouth, NH 03801

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 01-032**

May 3, 2001

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division (the Division) to Mill Lane Realty Trust (Attn: Jonathan Arndt, Trustee), pursuant to RSA 482-A and Env-C 614. The Division is proposing that fines totaling \$500 be imposed against Mill Lane Realty Trust for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. Parties

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Mill Lane Realty Trust is a duly formed trust overseen by Jonathan Arndt, Trustee, and having a mailing address of 25 Maplewood Avenue, Portsmouth, NH 03801.

III. Summary of Facts and Law Supporting Claims

1. Pursuant to RSA 482-A, the Department of Environmental Services (DES) regulates dredging, filling, and construction in wetlands. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. The Mill Lane Realty Trust (the Trust) is the owner of property located on Mill Lane in Hampton Falls, more particularly identified on Town of Hampton Falls Tax Map 1 as Lot 19 (the "Property"). Jonathon W. Arndt, is the Trustee of the Trust.
4. On June 8, 1999, the Division received a Standard Dredge and Fill Application (the Application) prepared by Millette, Sprague, Colwell, Inc. (MSC) on behalf of Mr. Arndt for

construction of a 16-foot wide driveway that crossed a wetland near the entrance of the driveway.

5. On June 15, 1999, Division personnel spoke with Peter Drummond of MSC regarding the Application. Mr. Drummond advised Division personnel that the driveway had been constructed in approximately April 1999, prior to the date the Division received the Application. Mr. Drummond indicated to Division personnel that he had a conversation with Mr. Arndt in March 1999, and that he had advised Mr. Arndt not to begin construction of the driveway without a wetlands permit.

6. On June 18, 1999, the Division received correspondence from the Town of Hampton Falls Conservation Commission objecting to the Application. The Conservation Commission advised the Division that members of the Conservation Commission had inspected the Property on June 12, 1999. The Conservation Commission objected to the Application based on alleged violations of various Town of Hampton Falls wetland setback requirements. The Conservation Commission also alleged that Mr. Arndt had impacted approximately 494 square feet of a wetland to construct his driveway prior to submitting the Application.

7. On June 25, 1999, Division personnel inspected the Property. During the inspection, Division personnel observed that the driveway access requested in the Application had already been constructed. Division personnel observed that the driveway crossed, in part, a scrub-shrub wetland, resulting in fill being placed within the wetland.

8. On July 26, 1999, the Division received a revised wetlands delineation from MSC. The revised delineation showed the area of wetlands impacted by the driveway was 673 square feet.

9. In response to a request from the Division to provide plans that would result in reduced wetland impacts, MSC submitted to the Division a revised plan on August 3, 1999 that included a proposed alternative location of the driveway entrance. The August 3, 1999 plan included a provision to "remove 872 +/- S.F. of existing driveway and restore wetlands."

10. On September 20, 1999, the Division issued permit number 1999-1074 (the Permit) based on the August 3, 1999 plan. The Permit was issued with specific findings (the Findings) on which the decision to issue the Permit was based. The Findings included the following (paragraph numbers refer to specific findings):

4. The unauthorized driveway crossing impacting 827 [sic]¹ square feet of wetlands shall be removed prior to the new driveway being installed.

5. Fine penalty for the unauthorized work shall be pursued and documentation will be forthcoming under separate cover.

11. Mr. Amdt was advised in the Findings that any party may apply for reconsideration with respect to any matter determined in this action within 20 days from the date of this notification. The Division did not receive any request for reconsideration of the Findings.

¹ The actual wetland impact to be restored was 673 square feet. The total amount of existing driveway to be removed was 872 square feet.

12. RSA 482-A:3, I states that in part that [n]o person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES].

13. Wt 303.04(f) defines a minimum impact project requiring a permit from DES to include, in part, [p]rojects involving alteration of less than 3000 square feet in swamps or wet meadows that are not in prime wetlands or do not meet the requirements of Wt 303.02(k), provided that no previous [DES] permit has placed restrictions on the property of the wetlands.

15. Env-C 614.02(b)(1) defines a Class I violation, for which the specified fine is \$500, as including [a] total impact of 3,000 square feet or less in a non-tidal swamp or wet meadow that does not involve fill for lot development, with disturbance of no more than 5 percent of the area of impacted wetlands.

IV. Violations Alleged

1. Jonathan Arndt has violated RSA 482-A:3, I and RSA 482-A:14, III by constructing a driveway impacting 673 square feet of wetlands without a permit from DES.

V. Proposed Administrative Fines

1. For the violation identified in IV.1, above, Env-C 614.02 specifies a fine of \$500.

The total fine being sought is \$500.

VI. Hearing, Required Response

You have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, July 26, 2001 at 2:30 p.m. in Room C-110** of the DES offices at **6 Hazen Drive** in Concord, NH. **Pursuant to Env-C 601.06, you are required to respond to this notice.** Please respond **no later than June 15, 2001**, using the enclosed colored form as follows:

1. If the Trust plans to attend the hearing, please have an authorized representative sign the appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, as noted on the form.

2. If the Trust chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.

3. If the Trust wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to Mr. Ballentine **and** call Mr. Ballentine to indicate the Trust's interest in settling.

The Trust is not required to be represented by an attorney. If the Trust chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed

findings of fact to the person conducting the hearing.

If the Trust wishes to have a hearing but is unable to attend as scheduled, the Trust must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If the Trust fails to notify Mr. Ballentine in advance and does not have a representative attend the hearing, the hearing will be conducted in the Trust's absence in accordance with Env-C 204.09.

VII. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that the Trust committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that the Trust committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

- * Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that the Trust proves, by a preponderance of the evidence**, applies in this case:
 1. The violation was a one-time or non-continuing violation, **and** the Trust did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** the Trust did not benefit financially, whether directly or indirectly, from the violation.
 2. At the time the violation was committed, the Trust was making a good faith effort to comply with the requirement that was violated.
 3. The Trust has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
 4. Other information exists which is favorable to the Trust's case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

The hearing that has been scheduled is a formal hearing. The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that **the**

Trust committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is the Trust's opportunity to present testimony and evidence that the Trust did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If the **Trust** has any evidence, such as photographs, business records or other documents, that the Trust believes show that the Trust did not commit the violation(s) or that otherwise support the Trust's position, the Trust should bring the evidence to the hearing. The Trust may also bring witnesses (other people) to the hearing to testify on the Trust's behalf.

If the Trust wishes to have an informal meeting to discuss the issues, the Trust must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If the Trust has any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

COPY
Harry T. Stewart
Harry T. Stewart, P.E., Director
Water Division

Enclosure (NHDES Fact Sheet #CO-2000)

cc: Gretchen Rule, DES Enforcement Coordinator
Susan Alexant, DES Rules & Hearings Attorney
Harry T. Stewart, P.E., Director
Marjory Swope, NHACC
Michael Walls, DOJ/EPB
Hampton Falls Conservation Commission
Hampton Falls Board of Selectmen
Richard W. Head, DES (File #1999-1074)

***** RETURN THIS PAGE ONLY *****

APPEARANCE

____ On behalf of the Trust I will attend the hearing scheduled for **Monday, July 26, 2001 at 2:30 p.m.** in **Room C-110** of the DES offices at **6 Hazen Drive** in Concord, NH.

Signature

Date

Name (please print or type): _____

Title: _____

WAIVER OF HEARING

____ I certify that on behalf of the Trust I understand my right to a hearing regarding the imposition of the proposed administrative fine and that as an authorized representative of the Trust, I hereby waive those rights. The fine payment in the amount of \$500 paid to Treasurer, State of New Hampshire is enclosed.*

** If any portion of the payment is made by a check, draft, or money order which is returned or dishonored due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Signature

Date

Name (please print or type): _____

Title: _____

RETURN THIS PAGE ONLY TO:

James Ballentine, DES Enforcement Paralegal
Department of Environmental Services
6 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095